tors for the second guarantee cannot be said in the strict sense of the word 'identical' to enable us to decide by implication that the second guarantee is in fact given in substitution for, and to discharge, the former. The amount guaranteed under the first guarantee was also different from that in the second guarantee where the terms of repayment of the term loans themselves are different. Besides, the second guarantee could only take effect if the moneys under the term loans were released but the evidence shows that no moneys had been released thereunder. More importantly, there is no evidence for us to hold that it was intended by the appellant that the first be replaced by the second guarantee and that the guarantor be discharged. On the contrary, we are satisfied on evidence that it was the intention of the respondent that the first and the second guarantee should subsist side by side and not one in substitution for another, with all apparent consequences following. Neither can we imply from the giving of the second guarantee per se such intention. On the other hand we are of the view that the rest of Gibbs CJ's dictum in the passage quoted above is applicable to the facts obtaining in the present case.

In the result on these grounds the appeal should also be dismissed with costs. The deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Raj Selva & Co; Lim Seong Chun & Co.*

Reported by *Prof Ahmad Ibrahim*

Development & Commercial Bank Bhd v Astrid Jorunn Saniman

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S 7-31-3563-88
LIM BENG CHOON J
24 OCTOBER 1990

Civil Procedure — Substituted service — Defendant claiming to be out of jurisdiction — Avoiding service — Order for substituted service on last known address of defendant — Rules of the High Court 1980, O 6 & O 10

Civil Procedure — Service of summons — Setting aside — Application made before entering conditional appearance — Irregularity — Failure to object — Waiver

Evidence — Defendant claiming to be out of jurisdiction — Onus of proof — Evidence Act 1950, s 106

The plaintiffs sought an order to sell property in the name of the defendant but charged to the plaintiffs. The plaintiffs twice attempted to serve the originating summons on the defendant, at her last known place of residence but were unsuccessful as the premises was locked. On 21 December 1988 the plaintiffs wrote to the defendant, by AR Registered mail, informing her that the process server would be calling at her address on 30 December 1988 to effect service. The letter was not returned suggesting that it must have been accepted. However the defendant's premises was again locked on 30 December 1988. On 17 January the plaintiffs obtained an order for substituted service on the defendant by way of posting the summons at the defendant's last known address and on the notice board of the High Court at Kuala Lumpur.

No appearance was entered by the defendant and the plaintiffs obtained a certificate of non-appearance. On 19 June 1989 the defendant was granted leave to enter conditional appearance. However, before entering the appearance the defendant applied, on 19 June 1989, to set aside service of the summons. The defendant claimed that she had lived in Paris for the last five years. She, however, failed to give her personal address.

Held, dismissing the defendant's application:

(1) The defendant had filed her application before entering a conditional appearance. This was a serious irregularity. However, as the plaintiffs had not objected and had proceeded to take steps to contend the defendant's application, they were deemed to have waived the irregularity.

(2) The onus of proof that the defendant had left Malaysia for France prior to the issue of the OS lies with the defendant.

(3) Apart from her bare words, the defendant had not produced any concrete evidence to support her claim to be living out of the jurisdiction. It would be an easy matter for her to give the exact date of her departure for Paris from the immigration stampings on her passport. In failing to do so, the court was not prepared to accept her bare statement without scrutinizing it in the light of the totality of the evidence adduced.

(4) The defendant had affirmed her first affidavit in Kuala Lumpur. She must have received the plaintiffs' solicitors' letter informing her that the process server would be calling to serve the summons on 30 December 1988, and must have known that the plaintiffs would next apply for substituted service.

(5) The court was satisfied that the defendant had deliberately gone abroad to evade service.

[Bahasa Malaysia summary

Plaintif memohon satu perintah untuk menjual harta yang berada di dalam nama defendan tetapi dicaj kepada plaintif. Plaintif telah mencuba sebanyak dua kali untuk menyampaikan saman pemula kepada defendan di tempat tinggalnya yang akhir diketahui tetapi telah gagal kerana tempat itu dikunci. Pada 21 Disember 1988 plaintif menulis defendan melalui mel Berdaftar AR untuk memberitahunya bahawa penyampai proses akan pergi ke tempatnya pada 30 Disember 1988 untuk melakukan penyampaian. Surat itu tidak dikembalikan dan ini menyarankan bahawa ianya telah diterima. Walau bagaimanapun tempat tinggal defendan sekali lagi dikunci pada 30 Disember 1988. Pada 17 Januari 1989 plaintif memperolehi satu perintah untuk penyampaian secara ganti pada defendan dengan melekatkan saman itu pada alamat defendan yang akhir diketahui dan pada papan notis Mahkamah Tinggi di Kuala Lumpur.

Defendan tidak memasukkan kehadiran dan plaintif memperolehi sijil ketidakhadiran. Pada 19 Jun 1989 defendan diberi kebenaran memasukkan kehadiran dengan syarat. Walau bagaimanapun, sebelum memasukkan kehadiran, defendan memohon pada 19 Jun 1989 untuk mengenepikan penyampaian saman itu. Defendan mendakwa bahawa beliau telah tinggal di Paris untuk lima tahun yang lepas. Beliau, walaupun begitu, gagal memberikan alamat persendirian.

Diputuskan, menolak permohonan defendan:

(1) Defendan telah memfail permohonannya sebelum memasukkan kehadiran dengan syarat. Ini adalah satu kesalahan yang serius. Walau bagaimanapun, oleh kerana plaintif tidak membantah dan telah terus mengambil langkah untuk melawan permohonan defendan, mereka dianggap telah melepaskan kesalahan itu.

(2) Beban membuktikan bahawa defendan telah meninggalkan Malaysia untuk Negeri Perancis sebelum pengeluaran saman pemula itu terletak pada defendan.

(3) Selain daripada katanya semata-mata, defendan tidak mengemukakan sebarang keterangan yang kukuh untuk menyokong dakwaannya bahawa beliau tinggal di luar bidang kuasa. Memanglah senang untuknya memberikan tarikh pemergiannya ke Negeri Perancis mengikut cap imigresen pada pasportnya. Oleh kerana beliau gagal berbuat demikian, mahkamah tidak bersedia menerima kenyataannya tanpa meneliti kenyataan itu dalam konteks keseluruhan keterangan yang dikemukakan.

(4) Defendan telah mengambil sumpah tentang afidavit pertamanya di Kuala Lumpur. Beliau mesti telah menerima surat peguam plaintif yang memberitahunya bahawa penyampai proses akan hadir untuk menyampaikan saman itu pada 30 Disember 1988, dan mesti tahu bahawa plaintif seterusnya akan memohon untuk penyampaian secara ganti.

(5) Mahkamah berpuas hati bahawa defendan telah sengaja pergi ke luar negeri untuk melepaskan diri dari penyampaian.]

Cases referred to

1 *Tozier* v *Hawkins* (1885) 15 QBD 650 (folld)
2 *Moore* v *Gamgee* (1890) 25 QBD 244 (folld)
3 *Kistler* v *Tettmar* [1905] 1 KB 39 (folld)
4 *Re Urquhart* (1890) 24 QBD 723 (refd)

Legislation referred to

Evidence Act 1950 s 106
Rules of the High Court 1980 O 6, O 10

Thomas Mariasoosay for the plaintiffs.
N Navaretnam for the defendant.

Cur Adv Vult

Lim Beng Choon J: In Originating Summons No 31-3563-88 (hereinafter referred to as OS 3563), filed on 16 November 1988, the plaintiff sought for an order to sell the land held under EMR 2094 lot 181, mukim Morib, Daerah Kuala Langat registered in the name of the defendant, Astrid Jorunn Saniman (I shall where appropriate refer to her as 'Astrid Saniman'), but charged to the plaintiff by the defendant vide lien holder's caveat registered on 1 August 1985 under Presentation No 227/85 Jilid 10 Folio 61 by public auction pursuant to s 281(2) of the National Land Code 1965 to recover moneys due and payable to the plaintiff pursuant to overdraft and fixed loans facilities granted to AJK Holdings Sdn Bhd together with accrued interests totalling $13,405,470.42 as at 30 September 1988.

There is no dispute at least at this stage that the defendant had charged her land to the plaintiff as security for the overdraft and fixed loans facilities granted to AJK Holdings Sdn Bhd. There is also no dispute at this stage that AJK Holdings had failed to pay the amounts of overdraft and loan facilities with accrued interests to the plaintiff.

On 17 January 1989, an application was made by the plaintiff for substituted service of OS 3563. In support of the application the process server of the solicitors representing the plaintiff, namely, M/s Azman Davidson & Co, filed an affidavit affirmed on 13 January 1989 in which he said that on 6 December 1988 at about 6.45 pm and on 8 December at about 11.45 am he called at No 4, Jalan Dalaman Tunku, Bukit Tunku, Kuala Lumpur for the purpose of effecting personal service of the said OS on the defendant, Astrid Saniman, but was unsuccessful as on both occasions he found that the premises was locked. On 21 December 1988, the said solicitors sent a letter of appointment by AR Registered post to the defendant informing her that the process server would be calling at the defendant's premises on 30 December 1988 at about 6 pm for the purpose of serving the said OS. In the letter it was also stated that the defendant should be present at her premises on that day and at the time failing which the plaintiff would apply to the court for an order for substituted service. It also said that if the said date and time was not suitable to the defendant, she was asked to give a date and time suitable to her as soon as possible. The letter of appointment was not returned to the sender and it must be assumed that the defendant must have accepted the same as the plaintiff had produced the cer-

tificate of posting. At the said date and time the process server of the said solicitors accordingly called at the premises of the defendant but he was unable to serve the said OS on the defendant as he found that the defendant's premises was locked. Under the circumstances and upon the application of the plaintiff the senior assistant registrar duly made an order on 10 February 1989 directing that the said OS 3563 be served on the defendant by way of substituted service by posting a copy of the said OS together with a sealed copy of the order on the notice board of the High Court at Kuala Lumpur and on a conspicious part of the last known address of the defendant, namely, No 4 Jalan Dalaman Tunku, Bukit Tunku, Kuala Lumpur and that such postings would be deemed good and sufficient service on the defendant seven days after the last posting. The process server of the solicitors acting on behalf of the plaintiff duly carried out the directions of the senior assistant registrar as stipulated in her order of substituted service and affixed the said OS together with the affidavit in support of the said OS and the order of substituted service on the front door of the defendant's premises at No 4 Jalan Dalaman Tunku, Bukit Tunku, Kuala Lumpur on 28 February 1989 at 6.05pm. Likewise copies of same documents were also affixed on the notice board of the High Court Kuala Lumpur on 1 March 1989. No appearance was entered by the defendant. Consequently the plaintiff's solicitors obtained a certificate of non-appearance on the part of the defendant from the senior assistant registrar on 14 March 1989. On the same date the plaintiff filed in its notice of appointment to hear the said OS and the said OS was fixed for hearing on 27 June 1989. The said notice was duly served on the defendant by affixing a copy of it at her premises at Jalan Dalaman Tunku.

On 19 June 1989 the defendant applied for leave to enter conditional appearance and her application was heard before the senior assistant registrar on 19 June 1989 who granted the defendant leave to enter a conditional appearance. The defendant did not file in her memorandum of conditional appearance until the 23 June 1989. However that may be the defendant applied by way of summons-in-chambers on 19 June 1989 to set aside the issue and/or service of OS 3563 for non-compliance with O 10 r 1 read with O 6 r 6 and O 7 r 5 of the Rules of the High Court 1980. In her affidavit in support of her application affirmed before a Commissioner of Oath at Kuala Lumpur on 19 June 1989 to set aside the issue and/or the service of the said OS she claimed that she had for the last five years or so been residing in Paris and had an address of service which was stated as c/o 94 Rue Chardon Lagarche 75016, Paris, France. She also averred that her solicitors had by letter dated 21 February 1989 informed the plaintiff that she was in France. In the circumstances therefore it was improper for the plaintiff to proceed by way of substituted service when they would have been unable to do so by way of personal service. It is interesting to note that even before the defendant had entered a conditional appearance she had already filed her application to set aside the issue and service of OS 3563. To my mind the steps taken by the defendant amounted to a serious irregularity which the court could strike out her application to set aside the issue and service of OS 3563. However as the plaintiff had not raised any objection and had proceeded to take steps to contend the defendant's application it must be deemed that they had waived the irregularity serious though it may be — see *Tozier* v *Bawkins*[1] and *Moore* v *Gamgee*.[2]

In response to the defendant's allegations one Low You Pak ('Encik Low') the manager/attorney of the plaintiff in his affidavit affirmed on 7 August 1989 claimed that an appointment letter dated 21 December 1988 to serve the OS 3563 at the last known address of the defendant, namely, No 4, Jalan Dalaman Tunku, Bukit Tunku (Kenny Hills) Kuala Lumpur was sent to the defendant. He also alleged that when the plaintiff sent the said appointment letter, the defendant did know about it and did in fact instruct her solicitors to write and state that she was not in the country. The plaintiff's solicitors therefore requested by letter dated 25 January 1989 whether the defendant's solicitors had instruction to accept service of process failing which the plaintiff would proceed to effect the cause papers to be served by substituted service at the last known address of the defendant. When the defendant's solicitors failed to reply, the plaintiff sent a further letter dated 15 February 1989 seeking confirmation whether they being the defendant's solicitors would accept service of the said OS. However the defendant's solicitors by letter dated 21 February 1989 stated that they had no instructions to accept service. No specific address of the defendant was given. Encik Low in his affidavit also stressed the point that the defendant's application in support of her application to set aside the issue and service of OS 3563 was affirmed by her on 19 June 1989 in Malaysia and she must have knowledge of the plaintiff's appointment letter to serve the said OS on her. Hence her overseas trips were deliberately made to evade service of the said OS.

In her affidavit-in-reply affirmed on 2 October 1989 the defendant reiterated that the plaintiff was aware that she had not been a resident of Malaysia for the past five years and that at the time she left Malaysia no legal proceedings had been commenced against her by the plaintiff. There was therefore no reason for her to leave the country in order to evade service. She, however, admitted that the appointment letter of the plaintiff dated 21 December 1988 indicating an intention to serve OS 3563 was brought to her attention when her representative, one Encik Jarni Sinan, went to her premises to

check whether there was any correspondence for her. She stressed that there was no obligation on the part of her solicitors to disclose to the plaintiff her address in France. In the last five years she had not been in Malaysia for more than two months and as such it could be seen that she was no longer a resident of Malaysia.

To counter the allegations of the defendant Encik Low affirmed a further affidavit on 24 October 1989. The main points raised in Encik Low's affidavit were that the defendant was the wife of Mohamed Rais Saniman ('Rais Saniman') who was involved in 'the BMF fiasco' and he was also a fugitive being sought by the Inland Revenue Department to whom he was indebted in the sum of $3,967,526.88 and the Inland Revenue Department could not institute legal proceedings against Rais Saniman as his whereabouts were unknown. An affidavit of the Senior Assistant Director of Cawangan Penyiasatan Jabatan Hasil Dalam Negeri was annexed to Low's affidavit. More importantly Encik Low stated in his affidavit that apart from the fact that the defendant gave a c/o address in Paris, her husband, Rais Saniman, in another action under OS 24-416-89 brought by the same plaintiff against him also gave a c/o address which was different from the address of Astrid Saniman. In giving the two different c/o addresses when in the common course of human conduct a wife and her husband should be staying together at one place, it is a clear indication that Astrid Saniman had given a c/o address at which she could not be contacted. Finally it was said that it would be a simple step to take to prove that the defendant had really left Malaysia some five years ago by producing her passport particulars which the defendant had failed to do.

Now the principles regarding substituted services are firstly as stated in *Kistler* v *Tettmar*[3] at p 45:

> I do not think that there is any authority for this proposition, which would lead to a manifest absurdity, namely, that the court would be rendered powerless to enforce its order if the person against whom the order was made chose to lock himself up, and so prevent personal service upon him. My brother Stirling has referred to an authority which establishes that there is no such absolute rule as is contended for; and that the general rule that there must be personal service is subject to an exception, and, where the existence of the order has been brought to the knowledge of a person who is evading personal service in the usual way, the court can enforce its order by attachment.

It is worthy of notice that in the *Tettmar* case[3] the rule requires personal service of an order before a writ of attachment could be issued for disobedience of it. In such a case personal service is therefore of paramount importance; yet it was held that there is an exception of the rule where the order has come to the knowledge of the person sought to be attached and he evades service of it. In *Re Urquhart,*[4] the petitioner creditors recovered judgment against the judgment debtor for a certain sum in the High Court in London and on 8 January 1890 they issued a bankruptcy petition against him in respect of the judgment debt. They were unable to effect personal service of the petition, the debtor having gone to Scotland on 27 December 1889. On 17 January 1890 the registrar, upon evidence which satisfied him that the debtor was keeping out of the way to avoid service, made an order of substituted service of the bankruptcy notice and the substituted service was effected under the order. Under r 154(1) of the English Bankruptcy Rules applicable at that time personal service of a petitioner was essential but if the court was satisfied by affidavit evidence or other evidence on oath that the debtor was, inter alia, keeping out of the way to avoid such service, it could order substituted service of the petition. Counsel for the debtor contended that as the debtor was out of jurisdiction r 154(1) of the Bankruptcy Rules 1886 which provided for substituted service was inapplicable. In rejecting the contention of counsel, Lord Esher MR said at p 725:

> It is said that an order cannot be made for substituted service unless the debtor is within the jurisdiction; so that, if the creditor had known where he was, he could have been personally served with the notice. Is there any such restriction in r 154? It says that the court may order substituted service to be made, if it is satisfied by evidence 'that the debtor is keeping out of the way to avoid such service'. There is nothing in those words to shew that an order for substituted service cannot be made if the debtor is keeping out of the way out of the jurisdiction. There is nothing to confine the words to a debtor who is keeping out of the way within the jurisdiction. The words are quite general, and, in my opinion, if the court is satisfied that the debtor has gone out of the jurisdiction to avoid service, an order for substituted service can be made.

Reverting to the present case, it is important to bear in mind that the onus of proof that the defendant had left Malaysia for France prior to the issue of the OS 3563/88 lies with the defendant pursuant to s 106 of the Evidence Act 1950. In determining whether the defendant has discharged the onus let us examine the affidavit evidence adduced in this case.

There is no dispute that the plaintiff here had earlier instituted a writ action under OS 21-253-81 against AJK Holdings Sdn Bhd, Rais Saniman and Astrid Saniman as defendants in that writ action. Service of the writ and the statement of claim was made by substituted service and the three defendants in that civil suit entered a memorandum of appearance. Nevertheless the plaintiff succeeded in obtaining a summary judgment pursuant to O 14 of the Rules of High Court 1980 on 7 July 1988 and the three defendants were ordered to pay the plaintiff the sum of $11,217,461.80 with interest. The plaintiff's claim in that civil suit was undoubtedly in respect of the non-payment of the overdraft and two fixed loan facilities granted to AJK Holdings Sdn Bhd for which Rais Saniman and his wife

Astrid Saniman had guaranteed payments of the same by charging their own lands as security. Notwithstanding the issue of the summary judgment, the three defendants made no attempt to make any payment to the plaintiff. Bearing in mind that Rais Saniman was, as stated by Encik Low in his affidavit of 24 October 1989, notoriously involved in 'the BMF fiasco', there is absolutely no doubt that Rais Saniman was prior to the BMF fiasco, holding an important executive post in Bank Bumiputra. Needless to state that as a senior executive officer of Bank Bumiputra he must be fully aware of the routine bank procedure of applying to court for an order to sell lands charged as security for loans made to a party who failed to comply with the conditions of repayment as agreed under the charge instrument. That being the case and because of the wife/husband relationship between the defendant and Rais Saniman it cannot be denied that both, the defendant and Rais Saniman, were fully aware that the plaintiff would certainly apply to the court for the sale of their lands by public auction pursuant to ss 256 and 281 of the National Land Code 1965. It had however been contended that Rais Saniman and his wife had the right to go abroad notwithstanding that they were aware of the summary judgment obtained against them and the steps which the plaintiff would take to have their charged lands sold by public auction. That may well be true but the knowledge on the part of the defendant and Rais Saniman about the matters stated above is an element which I am entitled to take into consideration in determining whether the defendant went abroad in order to evade service of the OS 3563.

The next matter which I must take into consideration is that the defendant had in both her affidavits asserted that she had left Malaysia to stay in Paris for some five years or so prior to the date in which she filed her first affidavit affirmed on 19 June 1989. She also asserted that her solicitors had duly informed the solicitors of the plaintiff regarding her absence from Malaysia. It is significant to note that apart from her bare words she did not produce any concrete evidence to support her statement. It would be an easy matter for her to give the exact date of her departure for Paris from the immigration stampings on her international passport; it would equally be easy for her to produce a photostat copy of the relevant page or pages from her international passport and exhibit it or them with her affidavit to show the exact date when she left for Paris. In failing to do so, I am not prepared to accept her bare statement without scrutinizing it in the light of the totality of the evidence adduced in the present case.

In examining the affidavit evidence of the defendant she admitted in para 4 of her second affidavit in reply affirmed on 2 October 1989 that she came to know of the letter of appointment of service of the OS 3563 sent by the plaintiff's solicitors dated 21 December 1988 only when her representative one Encik Jarni Sinan went to her premises in order to check whether there was any correspondence for her. This statement of hers is highly incredible simply because the said letter was sent by AR Registered post and the postman would not leave such a letter in a mail box of the premises nor leave it at the doorstep of the premises; he must surely ensure that some one must formally acknowledge receipt of the same before delivering it. The plaintiff had produced a certificate of posting and the said letter of appointment was never returned to the sender. It is therefore highly probable that the defendant, Astrid Saniman, had personally acknowledged receipt of the said letter and read the contents of the same on or about 22 December 1988.

The second matter to take note of is that after sending the aforesaid letter of appointment the solicitors for the plaintiff took the precaution of writing to the solicitors of the defendant in OS 3563 on 25 January 1989 to inquire whether they would accept service of the said OS. As the plaintiff's solicitors failed to get any response from the defendant's solicitors, they therefore applied and obtained an order of substituted service on 10 February 1989. Before they served the OS 3563 by way of substituted service they wrote again to the defendant's solicitors inquiring once again whether the latter would accept service of the said OS on behalf of the defendant. It was only on 21 February 1989 that the defendant's solicitors replied thus:

> We refer to your letter of 15 February 1989 and wish to inform you that we have no instruction to accept service of the originating summons on behalf of Astrid Jorunn Saniman who is in France *at the moment.* (Emphasis supplied.)

Under the circumstances it is legitimate for the court to pose two questions. First, if the defendant had before her departure for Paris some five years ago informed her solicitors of the date of her departure and an address in Paris at which she could be contacted surely it would not take her solicitors nearly a month to reply to the request of the plaintiff's solicitors. More importantly they would not have said that the defendant was in France at the moment but rather that she had left for France some time ago and she was still in France. Secondly, if on the other hand the defendant's solicitors did not know when exactly she left for Paris and had not been given an address in Paris at which she could be contacted then how would they be able to reach her to get instructions? In the absence of any answers to the question the only conclusions this court could arrive at is first, upon receipt of the letter of appointment the defendant knew very well that the plaintiff would subsequently apply for substituted service. Hence she had to contact her solicitors in February 1989 and gave instructions to them. Alternatively, upon being informed

of the letter of appointment by the agent as asserted by her, she came back to Malaysia to give instructions to her solicitors. In either way the defendant knew of the issue and service of OS 3563 but she intended to evade service of the same. This point is substantiated by her admission in her second affidavit in reply dated 2 October 1989 where she said that in the last five years she had not been in Malaysia for more than two months. This statement clearly shows that she did visit Malaysia on and of although she said she had not stayed in the country for more than two months.

In arriving at the aforesaid conclusions, I also took note of the significant fact that she affirmed her first affidavit dated 19 June 1989 in support of her application to set aside the issue and service of OS 3563 *before a Commissioner of Oath in Kuala Lumpur.* In the absence of any explanation, the only logical inference that could be drawn is that the defendant was in the country when the said OS was served on her by substituted service on 29 February 1989. Furthermore the second affidavit in reply of the defendant was prepared by her solicitors while she was still in the country and it was intended that she affirmed the said affidavit before a Commissioner of Oath in Kuala Lumpur because the word 'Before me . . . Commissioner of Oaths Kuala Lumpur' were typed in that affidavit. If as she claimed she was not in the country why would her solicitors type the said words in the said affidavit? All they need to do was to advise the defendant the substance of the affidavit in reply and let her affirm it before a Notary Public in Paris. In such a state of affairs I am more than convinced that at all material times the defendant, Astrid Saniman, was in Malaysia and she knew about the issue and service of OS 3563. She deliberately left Malaysia after filing her application to set aside the said OS to evade service of the same.

Finally I agree with what Mr Low had said in his affidavit, viz the fact that the defendant gave a c/o address in Paris which was different with the c/o address given by her husband when in the common course of human conduct the defendant would be living with her husband at the same place is a clear indication that the defendant deliberately gave a deceptive address at which she could not be contacted even had the plaintiff applied to serve the OS 3563 out of jurisdiction pursuant to O 11 of the Rules of High Court 1980. By giving such a deceptive address it confirms that the defendant deliberately went abroad to evade service.

From the evidence stated above I am fully satisfied that the defendant, Astrid Saniman, was still in the country when OS 3563 was issued and she deliberately avoided service of the same. In any case I am fully convinced that her departure from the country was to evade service of the said OS.

In the circumstances I dismissed the application of the defendant to set aside the issue and services of OS 3563 with costs. The defendant will have 21 days from today to file her affidavit if she intends to defend the action instituted against her.

Application dismissed.

Solicitors: *Azman Davidson & Co; Shearn Delamore & Co.*

Reported by *Mathavan Devadas*

Hu Sepang v Keong On Eng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO P 1569 OF 1985
LIM BENG CHOON J
18 SEPTEMBER 1990

Civil Procedure — Statement of claim — Striking out — Principles to be applied — Rules of the High Court 1980, O 18

Tort — Breach of statutory duty — Damage occasioned by failure of police to perform statutory duty

Police — Duty to protect life and property — Duty to maintain the peace — Police Act 1967, s 3

The plaintiff was assaulted at the Malacca State Assembly Building in the presence of the first defendant, an inspector of police, and the second defendant, the Chief Police Officer of Malacca. The plaintiff subsequently brought an action for damages against the first and second defendants claiming that they had failed to render assistance to the plaintiff and were in breach of their statutory duty to prevent the assault. The government of Malaysia was joined as third defendants. The defendants applied to strike out the statement of claim on the grounds that the action did not reveal any cause of action. The registrar dismissed the application, and the defendants appealed.

Held, dismissing the defendants' appeal:

(1) The power to strike out an action on disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious causes. So long as the statement of claim disclosed some cause of action or raised some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

(2) Where a cause of action is based on breach of statutory duty the plaintiff must show that (a) the injury suffered was within the ambit of the statute; (b) the statutory duty imposed a liability to civil action; (c) the statutory duty was not fulfilled; (d) the breach of duty had caused the injury.

(3) A statute may impose a duty towards persons generally, in which case no question can arise of whether the plaintiff is within the class protected.

(4) Where a statute offered a power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy would lie.

(5) Where the loss is occasioned by a failure to exercise a power coupled with a discretion there is no liability. But a